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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-5935

ROOSEVELT GREEN,

Petitioner,

-v-

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to effective assistance of counsel at his trial, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. Whether Petitioner was denied his right to due process of law, equal protection of the law, meaningful access to the courts and compulsory process, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States by the denial by the State Habeas Corpus Court of Petitioner's Motion for Funds for expert assistance.

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IN THE

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No. 81-

ROOSEVELT GREEN,	)
	)
Petitioner,	)
	)
-v-	)
	)
WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA

Petitioner prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia, entered on September 18, 1981. Application for Certificate of Probable Cause to Appeal was denied by the Supreme Court of Georgia on November 5, 1981.

CITATIONS TO OPINIONS BELOW

The unreported opinion of the Superior Court of Butts County, Georgia and the Order of the Georgia Supreme Court are set out in Appendices "A" and "B" respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Butts County, Georgia, was sought in the Supreme Court

of Georgia pursuant to Ga. Code Ann. §24-4526. Review was finally denied on November 5, 1981. Pursuant to Rule 20 of the Rules of this Court, the time for this petition runs from the denial of review issued by the Supreme Court of Georgia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions which are set out in Appendix "C" hereto.

QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to effective assistance of counsel at his trial, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. Whether Petitioner was denied his right to due process of law, equal protection of the law, meaningful access to the courts and compulsory process, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States by the denial by the State Habeas Corpus Court of Petitioner's Motion for Funds for expert assistance.

HOW THE ISSUES WERE RAISED BELOW

1. Petitioner's state Petition for Writ of Habeas Corpus raised the issue of the effective assistance of Petitioner's trial counsel. The habeas court found this allegation to be without merit. The constitutional issue was again raised on appeal to the Supreme Court of Georgia which affirmed the judgment of the state habeas corpus court.

2. Prior to the hearing on Petitioner's state Petition

for Writ of Habeas Corpus, Petitioner moved the habeas corpus court to provide necessary funds for expert assistance, including an investigator. The Court denied the motion, specifically stating that it had no authority to grant such a motion. The constitutional issues were raised in an appeal to the Supreme Court of Georgia which affirmed the judgment of the habeas corpus court.

STATEMENT OF THE CASE

1. On January 28, 1978, Petitioner was convicted in the Superior Court of Monroe County, Georgia, of murder and was sentenced to death.

2. The conviction and sentence of death were affirmed by the Supreme Court of Georgia in Green v. State, 242 Ga. 261 (1978).

3. Petitioner then filed a Petition for Writ of Certiorari in this Court which was granted, and on consideration of the issues this Court reversed the judgment of the Georgia Supreme Court as to the sentencing phase of the trial. Green v. Georgia, 442 U.S. 95 (1979).

4. On November 1, 1979, Petitioner was again tried in the Superior Court of Monroe County, Georgia, and was again sentenced to death by a jury. The Supreme Court of Georgia affirmed the re-sentencing in Green v. State, 246 Ga. 598 (1980).

5. Petitioner applied to this Court for a Writ of Certiorari to this Court on December 30, 1980. His application was denied on February 23, 1981, and an Application for Rehearing, filed on March 20, 1981, was denied.

6. Petitioner then filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on June 11, 1981. A hearing was held on August 10, 1981, in the Superior Court of Butts County, Georgia, and his petition

was denied on September 18, 1981.

7. Petitioner then filed an Application for Certificate of Probable Cause to Appeal which was denied by the Supreme Court of Georgia.

8. During the hearing on Petitioner's state habeas corpus petition, Petitioner submitted evidence that his trial counsel, Richard Milam, prior to Petitioner's re-sentencing trial, filed a Motion for Funds to represent and defend Petitioner adequately on his retrial. The trial court awarded Petitioner's counsel the sum of five hundred dollars ($500.00) to prepare the case. Mr. Milam testified during the habeas hearing that, although he knew that Petitioner had grown up in the states of Alabama and New York, that due to a lack of funds, no effort was made to investigate in the states in which Petitioner was raised for evidence in mitigation or witnesses who could testify as to Petitioner's character or background.

9. Prior to his state habeas corpus hearing, Petitioner moved for funds for expert assistance. Among the requests, Petitioner requested funds to procure the services of an investigator to search for available mitigating evidence which could have been presented during his re-sentencing trial, had his counsel been provided with sufficient funds. This motion was denied.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL, AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Since Powell v. Alabama, 287 U.S. 45 (1932), and Gideon v. Wainwright, 372 U.S. 335 (1963), it has been firmly established that a defendant charged in state court with a serious

crime has a constitutional right under the Sixth Amendment and the due process clause of the Fourteenth Amendment to the "Assistance of Counsel for his defense." This right rests not simply upon the commencement of the criminal trial, but at the very outset of criminal proceedings. Powell, supra, 287 U.S. 45, 57. It is not fulfilled merely by the appointment of an attorney or the presence of an attorney at one's side:

> Despite there being perhaps some salutary effect from the mere presence of a competent attorney available to a defendant in a criminal proceeding, physical presence alone fails to satisfy the mandate of the Sixth Amendment. United States v. Woods, 487 F.2d 1219 (5th Cir., 1973).

Rather, the Sixth Amendment guarantee is satisfied only when an accused is provided "effective counsel" -- that is, "counsel reasonably likely to render, and rendering, reasonably effective assistance" [emphasis in original]. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir., 1960), modified on other grounds and affirmed en banc, 289 F.2d., 928 (5th Cir., 1961), cert. den., 368 U.S. 877 (1961).

The guarantee of counsel "reasonably likely to render and rendering effective assistance" (the "MacKenna standard") has been reaffirmed so consistently and so many times in the Fifth Circuit that it has become the idiomatic formulation of the Sixth Amendment standard. See, e.g., Easter v. Estelle, 609 F.2d 756, 759 (5th Cir., 1980); Fitzgerald v. Estelle, 505 F.2d 1334, 1338 (5th Cir., 1974), cert. den. 422 U.S. 1011 (1975); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir., 1974).

Whenever a person has been convicted of a capital offense, the conduct of his counsel must be strictly scrutinized. Smotherman v. Beto, 276 F.Supp. 576, 586 (N.D. Tex., 1967).

This is necessiated by the understanding, expressed by the Supreme Court of the United States in Gardner v. Florida, 430 U.S. 349 (1977), that death is different from other forms

of punishment:

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reasons rather than caprice or emotion. 430 U.S. 349, 357-58.

Effective assistance of counsel in a capital case must be assessed with respect to two proceedings which together comprise the defendant's "trial." In the wake of Furman v. Georgia, 408 U.S. 238 (1972), death penalty statutes in Georgia and other states were modified in order to fashion a proceeding that was intended to provide statutorily guided discretion in capital sentencing. Ga. Code Ann. §26-3102.

For the assistance of counsel to be effective in a capital case, it must be demonstrably effective in both the guilt/innocence phase and the sentencing phase of the trial. The quality of representation afforded during the penalty stage of Petitioner's trial must be considered in the light of the holding of the Supreme Court of the United States that,

> [I]n capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence. Gregg v. Georgia, 428 U.S. 153, 189 n. 38 (1976) [emphasis added].

This Court has explained minimum requirements for the fair determination of a sentence of death in Woodson v. North Carolina, 428 U.S. 280, 304 (1976):

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a desig-

> nated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> While the practice of individualizing sentencing determination generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect of humanity underlying the Eighth Amendment [citation omitted] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

See, also, Lockett v. Ohio, 438 U.S. 586 (1978). The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel. A substantial failure to obtain and present such information plainly constitutes ineffective assistance of counsel. See, Mason v. Balkcom, 531 F.2d 717, 724 (5th Cir., 1976); United States v. Pinkney, 551 F.2d 1241, 1248 (D.C. Cir., 1976).

Even in non-capital cases, counsel has a clear and universally recognized obligation to present to the sentencing authority evidence of all relevant circumstances of the background and character of the defendant, and a failure to meet this obligation jeopardizes a defendant's Sixth Amendment rights.

Counsel is ineffective, furthermore, "if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1227 (5th Cir., 1979). It is the duty of counsel to interview potential witnesses and to make an independent examination of the factual circumstances and law involved. United States v. Johnson, 615 F.2d 1125 (5th Cir., 1980); Rummel v. Estelle, 590 F.2d 103 (5th Cir.), cert. granted, 441 U.S. 960 (1979).

II. PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, MEANINGFUL ACCESS TO THE COURTS, AND COMPULSORY PROCESS, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE DENIAL BY THE STATE HABEAS CORPUS COURT OF PETITIONER'S MOTION FOR FUNDS FOR EXPERT ASSISTANCE.

It is "established beyond a reasonable doubt that prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817 (1977). This right, which insures that incarcerated persons have a fair opportunity to present their claims to the courts, has been recognized by this Court in a number of decisions which have struck down procedures which effectively limit a prisoner's chance to have his claims heard. See, Ex Parte Hull, 312 U.S. 546 (1941); Griffin v. Illinois, 351 U.S. 12 (1956); Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961); Douglas v. California, 372 U.S. 358 (1963); Johnson v. Avery, 393 U.S. 483 (1969); Procunier v. Martinez, 416 U.S. 396 (1974); Wolff v. McDonnell, 418 U.S. 539 (1974); Bounds v. Smith, supra.

This right of access to the courts has two essential components. The first is that barriers which restrict a prisoner's effective preparation of his constitutional claims must be removed. Thus, for example, in Johnson v. Avery, supra, this Court struck down a regulation prohibiting prisoners from assisting one another in the preparation of habeas corpus applications and other legal matters. In Procunier v. Martinez, supra, this Court invalidated a prison regulation prohibiting the use of law students and legal para-professionals by attorneys to interview prisoners. "Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Id., at 419. And in Bounds v. Smith, supra, the state was required either to provide inmates with law libraries

or alternatively to provide professional or quasi-professional legal assistance for the research and preparation of petitions in order to give prisoners meaningful access to the courts.

It is not enough, however, that barriers to preparation be removed or that an inmate have a formal right to file pleadings and papers. The second component of the right of access to the courts is that the access afforded a prisoner must be meaningful. If a particular instrument or means of assistance is necessary to make the legal proceeding meaningful, moreover, this instrument may not be denied to prisoners simply because they are without the financial means to pay for it. For "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." Roberts v. LaVallee, 389 U.S. 40, 42 (1967). The state is required to make available the "basic tools of an adequate defense or appeal," Britt v. North Carolina, 404 U.S. 226, 227 (1971), to those incarcerated persons unable to pay. For example, in Griffin v. Illinois, supra, the Supreme Court of the United States held that because a defendant could not obtain an "adequate and effective appellate review" without a trial transcript, the state must provide trial records to inmates unable to buy them. In Douglas v. California, supra, this Court held that counsel was essential for an inmate to have a meaningful appeal fron his convictions, and therefore, counsel must be appointed for those prisoners unable to retain an attorney. Furthermore, an indigent defendant must not be forced to pay a filing fee as a prerequisite for an appeal, Burns v. Ohio, supra, Douglas v. Green, 363 U.S. 192 (1960); or for a habeas corpus petition, Smith v. Bennett, supra. See, also, Mayer v. City of Chicago, 404 U.S. 189 (1971); Williams v. City of Oklahoma City, 395 U.S. 458 (1969); Rinaldi v. Yeager, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington Board of Prison Terms and

Paroles, 357 U.S. 214 (1958).

Under these decisions the state is required "to shoulder affirmative obligations" so that all prisoners are afforded a meaningful opportunity to present their claims. Bounds v. Smith, supra. "The right of access to the courts ... assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell, supra, at 579.

Failure in the present case to provide Petitioner with funds for expert assistance violated both components of the constitutional right of access to the courts, for it created a de facto barrier to Petitioner's assertion of his constitutional claims and rendered meaningless the formal access afforded him.

The record is unchallenged that Petitioner himself is presently indigent. Roosevelt Green clearly is incapable of defending himself against capital charges.

Unless he is afforded "the guiding hand of counsel," Powell v. Alabama, supra, at 69, to press his state habeas corpus claims, Petitioner faces what amounts to an impenetrable barrier to relief.

The constitutional right of access to the courts applies not only at trial and on direct appeal, but also during post-conviction proceedings.

Whatever the constitutional obligation of a state might be to provide post-conviction remedies to state prisoners, it is clear that once a system of post-conviction relief has been adopted, it must be administered to provide a full and fair hearing to state prisoners.

This Court, in an extended line of cases, has reversed and remanded state court decisions in which prisoners' post-conviction claims had been rejected without such a hearing. See, Pyle v. Kansas, 317 U.S. 213 (1942); Pennsylvania ex rel. Hermann v. Clardy, 350 U.S. 116 (1955); Sublett v. Adams, 362 U.S. 143 (1960); Wilde v. Wyoming, 360 U.S. 607 (1960); McNeal

v. Culver, 365 U.S. 109 (1961); Bushnell v. Ellis, 366 U.S. 418 (1961). As Mr. Justice Powell recently reminded the state courts in Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (concurring opinion): "It is the solemn duty of ... (state) courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law." See also, Stone v. Powell, 428 U.S. 468, 495 n. 35 (1976); Case v. Nebraska, 381 U.S. 336, 344-45 (1965) (Brennan, J. concurring).

Further, access to full and fair post-conviction procedures cannot be limited by economic barriers that have no rational relationship to the merits of the legal claims thought to be biased. Discrimination "based upon indigency alone," Lane v. Brown, 372 U.S. 477, 485 (1963) is impermissible. Eskridge v. Washington State Board of Prison Terms and Paroles, supra; Ross v. Schneckloth, 357 U.S. 575 (1958); McCrary v. Indiana, 354 U.S. 277 (1960); Smith v. Bennett, supra; Long v. District Court of Iowa, 385 U.S. 192 (1966); Gardner v. California, 395 U.S. 925 (1969).

The Court, in Johnson v. Avery, supra, Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal.), aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971), and in Bounds v. Smith, supra, has established irrefutably that "for the indigent as well as the affluent prisoner, post-conviction proceedings must be more than a formality." Johnson v. Avery, 393 U.S., at 486. In striking down the State of Tennessee's prison regulation which prohibited its inmates from assisting one another in the filing of state or federal post-conviction writs, the Court in Johnson held that the impact of the State's regulation "was to unconstitutionally forbi(d) illiterate or poorly educated prisoners to file habeas corpus petitions." 393 U.S., at 487. "Johnson v. Avery ... makes it clear that provision must be made to

insure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the court." Gilmore v. Lynch, supra, at 110.

The importance of meaningful access to post-conviction proceedings was underscored by this Court in Bounds v. Smith, supra, when the Court declared that such prisoner petitions "are the first line of defense against constitutional violations. The need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review." Id., at 827-828.

Any distinction of habeas corpus as a "civil" rather than a "criminal" proceeding is artificial and cannot act to deprive Petitioner of the assistance of counsel.

The Georgia habeas corpus procedure is a procedure which Petitioner must utilize and complete before he can petition in a United States District Court for a writ of habeas corpus.

The procedure in a United States District Court is set forth in a law enacted by Congress, 28 U.S.C. §2254, which provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure the question presented.

The state habeas corpus procedure may finally determine Fourth Amendment claims, Stone v. Powell, supra, and may very

well be determintive of and foreclose consideration of other substantial issues in the federal proceedings because "a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction ... shall be presumed to be correct ..." in the federal proceeding. 28 U.S.C. §2254 (d).

The function of the Georgia habeas corpus procedure as a means of determining constitutional claims in criminal cases is made clear by the Legislature's statement of legislative intent included with 1967 Ga. Laws, p. 835, et. seq., a complete revision of the habeas corpus statute:

> Section 1. Statement of Legislative Intent and Purpose.
>
> The General Assembly finds that expansion of the scope of habeas corpus in federal court by decisions of the United States Supreme Court, together with other decisions of said court (a) substantially curtailing the doctrine of waiver of constitutional rights by an accused and (b) limiting the requirement of exhaustion of state remedies to those currently available, have resulted in an increasingly larger number of state court convictions being collaterally attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by the courts of this State, that such increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights, with a resultant deterioration of the federal system and federal-state relations; that to alleviate said problems, it is necessary that the scope of state habeas corpus be expanded and the state doctrine of waiver of rights modified. The General Assembly further finds that expansion of state habeas corpus to include many sharply-contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases.

The requirement that access to the courts be meaningful takes on special significance in the context of an indigent person who has been sentenced to death. In death cases, courts must be "particularly sensitive to see that every safe-

guard is observed." Gregg v. Georgia, supra, at 187. Indeed, when a person's life is at stake, higher standards of regularity and fairness are required. The Supreme Court of the United States has consistently held that constitutional protections are particularly exacting in death cases. See, e.g., Powell v. Alabama, supra, at 71-72; Stein v. New York, 346 U.S. 156, 196 (1953); Williams v. Georgia, 349 U.S. 375, 391 (1955); Reid v. Covert, 354 U.S. 1, 45-46 (1957) (concurring opinion of Frankfurter, J.); Id. at 77 (Concurring opinion of Harlan, J.).

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, supra, at 305; See also, Gardner v. Florida, supra, at 357-358.

The obligation of the State of Georgia to ensure meaningful access to the state habeas corpus court must be evaluated in terms of the more stringent safeguards demanded when the state seeks the death penalty against a person.

Furthermore, without necessary funds for the assistance of an investigator, Petitioner was unable to exercise his right to locate and subpoena witnesses in his favor. "The right to offer the testimony of witnesses and to compel their attendance if necessary ... is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). See also, Webb v. Texas, 409 U.S. 95 (1972).

As this Court has stated concerning the companion Sixth Amendment right to confront witnesses, its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that any competing state interest be closely examined. See, e.g., Barker v. Page, 390 U.S.

719 (1968); Burger v. California, 393 U.S. 314 (1969). The only state interest which can be offered by the State of Georgia to justify the limitations on funds for expert assistance in state habeas corpus proceedings is the lessening of the costs.

CONCLUSION

For the reasonsshown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

ROOSEVELT GREEN,	*	
	*	
PETITIONER	*	
	*	
vs	*	HABEAS CORPUS NO. 5107
	*	
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	*	
	*	
	*	
	*	
RESPONDENT	*	

PETITION FOR A WRIT OF HABEAS CORPUS, FOR A STAY OF EXECUTION, AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

FINDING OF FACT AND CONCLUSION OF LAW

This is a Petition for Writ of Habeas Corpus to relieve the Petitioner, ROOSEVELT GREEN, of restraint under a conviction and sentence of death imposed upon him by the State of Georgia. The Court finds that he is presently imprisoned in the Georgia Diagnostic and Classification Center at Jackson, Georgia. That Walter D. Zant is the Warden of the Georgia Diagnostic and Classification Center in Jackson, Georgia. In that capacity, he has the custody of the Petitioner. Respondent Zant is charged by the laws of the State of Georgia with carrying out the execution of Petitioner's sentence of death, and Respondent is presently confining Petitioner for that purpose. That on January 28, 1978, Petitioner was convicted in the Superior Court of Monroe County, Flint Judicial Circuit, of the offense of murder. By a final judgment entered on January 28, 1978, Petitioner was sentenced to death upon the murder conviction. On September 8, 1978, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence of death. On September 28, 1978, the Court denied a timely Motion for Rehearing. On December 27, 1978, Petitioner tendered for filing a Petition for a Writ of Certiorariin the Supreme Court of the United States.

EXHIBIT A
P. 1

The Court granted certiorari, and on May 29, 1979, reversed the Supreme Court of Georgia and the Trial Court as to the sentencing phase of the trial.

The Court further finds that on November 5, 1979, a resentencing trial commenced in the Superior Court of Monroe County, Flint Judicial Circuit. On November 10, 1979, Petitioner was again sentenced to death for the crime of murder. On October 8, 1980, the Supreme Court of Georgia affirmed the Petitioner's second sentence of death. No Motion for Rehearing was filed. Green v. Georgia, 246 Ga. 593, 272 S. E. 2d 475 (1980). On January 5, 1981, Petitioner tendered for filing a Petition for Writ of Certiorari in the Supreme Court of the United States. On February 23, 1981, the Court denied certiorari. A timely Motion for Rehearing was filed and denied on April 20, 1981. On May 29, 1981, the Superior Court of Monroe County, Flint Judicial Circuit, set June 15, 1981, as the date for the execution of Petitioner's sentence of death.

The Petitioner then filed this Writ of Habeas Corpus in the Superior Court of Butts County. The Motion for Stay of Execution was denied and the Writ of Habeas Corpus was dismissed on June 11, 1981. Upon Application for Certificate of Probable Cause to appeal the dismissal of Petition of Habeas Corpus; it was Ordered by the Supreme Court of Georgia, that the case be remanded to the Habeas Corpus Court for a hearing of the issues presented in the Petition.

The matter then came on for a hearing before this Court on August 10, 1981 in Butts Superior Court. The Writ is in twenty-eight counts with numerious sub counts, many of which were never discussed in oral argument or written brief filed with the Court. After reviewing the record, of the first and second trials together with the record in this Writ of Habeas Corpus hearing together with affidavits and briefs the Court finds there is no evidence contained in the record or law cited in brief to

"A" P. 2

sustain the allegation contained in counts, 1, 2, 3, 5, 7, 8, 9, 10, 12, 13, 15, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, 28, these grounds were apparently waived since they were not insisted upon in argument or briefs. In connection with count, 4, 6, 11, 14, 18, 20 the Court finds Defendant was represented at the first trial by one capable attorney and three capable attorneys during the second trial, which was for the purpose of fixing punishment. The record reflects the fact that counsel very capably interviewed witnesses, investigated facts, including spending considerable time with the Defendant. The Defendant's counsel had the cooperation of the District Attorneys office, Crime Laboratory and Court so far as the making available to the Defendant all States evidence. There is no evidence to support the allegation that counsel failed to obtain and to present available mitigating testimony. The only evidence it is now suggested the Defendant was unaviable to have was that of some Father James, which is even now indefinate, questionable and repetitive of other available evidence.

The Court made a proper investigation of a sick juror who had an epiliptic seizure during the deliberation of the jury as reflected by the record at page 1,136 and replaced this juror with the first alternate. This was a matter that addressed itself to the discretion of the Judge and his actions were proper exercise of those discretions.

Trial counsel need not file a challenge to the jury unless there is some basis for doing so, and counsel in this case testified that he and co-counsel were convinced that the jury was not subject to challenge. Even now no evidence of any nature is offered to show that the jury was subject to challenge.

The question of security in the courtroom addresses itself to the Sheriff and to the Court, and has already been

"A" P.3

50

approved by the Supreme Court of Georgia in this case.

There is no evidence that additional funds could have produced any valuable or helpful evidence and the State is not required to furnish money for research or fishing expeditions.

JUDGMENT

IT IS THEREFORE ORDERED that the Writ of Habeas Corpus be and the same is hereby DENIED on each and every ground.

Grounds of complaint in the application for relief on Habeas Corpus have been considered and are determined to be without merit. There has been no denial or any of Petitioner's constitutional rights. The Court finds no merit in Petitioner's application and relief is expressly denied upon each and every ground thereof. Petitioner is remanded to the custody of the Department of Offender Rehabilitation.

Therefore, the sentenced previously imposed stands in full force and effect, and no legal reason exists to bar the execution of the sentence.

It is further Ordered that said officials of the State shall execute Defendant by electrocution as provided by law, and witnessed only by the executing officers under Code Section 27-2515, Defendant's relatives, counsel, and such clergymen and friends as Defendant may desire.

The execution shall take place at Georgia Diagnostic and Classification Center on October 5, 1981, between the hours of ten o'clock, A.M. and four o'clock, P.M.

IT IS SO ORDERED this the 8 day of September 1981.

H. LAMAR KNIGHT,
SENIOR JUDGE,
GEORGIA STATE AT LARGE

"A" P. 4

APPENDIX B

Application No. 1828

SUPREME COURT OF GEORGIA

ATLANTA, November 5, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROOSEVELT GREEN V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, P.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX B

APPENDIX C

GEORGIA CODE PROVISIONS

Georgia Code Annotated §24-4526

Appeals of Habeas Corpus After Criminal Convictions.

When Applications Granted: An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated §50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court of record.

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

(1) Grounds for writ.--
Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--
The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgment complained of, and clearly set for the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

APPENDIX "C"

(3) Jurisdiction and venue.--
The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior court of such counties have exclusive jurisdiction of habeas corpus actions arising under this section.

(4) Service of the petition.--
Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Correction, an additional copy of the petition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other authority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--
Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--
Within 20 days after filing and docketing of the petition, or within further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.--
(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.
(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.
(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the sate set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.
(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--
All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--
After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of law shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--
All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--
(a) Appeals in habeas corpus cases shall be governed by the Appellate Procedure Act of 1965 [§6-701, et seq.], except that as to final orders of the court which are adverse to petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and

and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

Georgia Code Annotated §26-3102

Capital offenses; jury verdict and sentence.

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in the offenses of treason and aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty. (Acts 1968, pp. 1249, 1335; 1969, p. 809; 1973, pp. 159, 170).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-

81 5935

ROOSEVELT GREEN,

Petitioner,

-v-

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, ROOSEVELT GREEN, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Superior Court of Butts County, Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46. Mr. Green's Affidavit in support of this motion will be forwarded to the Court as soon as it is received by counsel.

August F. Siemon

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Suite 214
Atlanta, Georgia 30309

(404) 352-4666

COUNSEL FOR PETITIONER

NO. 81-5935

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROOSEVELT GREEN, JR.,

Petitioner,

v.

WALTER D. ZANT,
SUPERINTENDENT,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Assistant Attorney General
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QUESTIONS PRESENTED

1.

Did Petitioner receive effective assistance of counsel?

2.

Is Petitioner in this civil habeas corpus proceeding entitled to money, merely upon request, for investigation and presentation of evidence, when Georgia law provides inexpensive alternative means of presenting evidence and Petitioner has failed to make any showing whatsoever of what evidence he might discover which would assist him in establishing federal constitutional infirmities in his conviction and sentence?

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NO. 81-

IN THE

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OCTOBER TERM, 1981

ROOSEVELT GREEN, JR.,

Petitioner,

v.

WALTER D. ZANT,
SUPERINTENDENT,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

This is Roosevelt Green's third petition before this Court for review of his death sentence. Green was convicted for the murder of Teresa Carol Allen on January 27, 1978, and sentenced to death. The conviction and sentence were affirmed in Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978). This Court set aside the death sentence in Green v. Georgia, 442 U.S. 95 (1979). The Supreme Court of Georgia remanded to the trial court with direction to retry the sentencing portion of the trial. Green v. State, 244 Ga. 27, 257 S.E.2d 543 (1979).

On November 10, 1979, after six days of jury selection and trial, Green was sentenced to death for the second time. The jury found as aggravating circumstances (1) that the murder was committed while the offender was engaged in the commission of another capital felony, to wit: kidnapping; (2) that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery; and (3) that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and aggravated battery to the victim. See Ga. Code Ann. § 27-2534.1(b)(2) and (7). Green's conviction and sentence were again affirmed on direct appeal. Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980). This Court denied the petition for a writ of certiorari. Green v. Georgia, ___U.S.___, 101 S.Ct. 1402, 67 L.Ed.2d 372, reh. denied, ___U.S.___, 101 S.Ct. 2011, 68 L.Ed.2d 320 (1981).

Green then filed a habeas corpus petition in the Superior Court of Butts County, Georgia, and was afforded a hearing on his

petition on August 10, 1981. Relief was denied by the state habeas court in an order filed September 21, 1981. Green's application for a certificate of probable cause to appeal to the Supreme Court of Georgia was denied November 5, 1981. The petition to this Court followed.

As this Court has been made aware in previous petitions, the facts of Green's crime are gruesome. Nevertheless, a brief summary of those facts is appropriate. Green and his companion, Carzell Moore,[1/] abducted 18 year old Teresa Carol Allen from her place of part-time employment.

> Once in the victim's car, appellant turned to the victim and said, "Bitch, take off your clothes." The victim pleaded that she was a virgin and not to rape her. While no body fluids of the appellant's blood type were found, testimony established sexual abuse of the victim by the appellant. Thereafter, appellant changed places with Moore who was driving the victim's car, and Moore raped the victim so forcibly as to tear her vagina. The victim was then shot twice by a high powered rifle. The first shot to the

---

[1/] This Court denied Moore's petition for a writ of certiorari, following the denial of state habeas relief, on May 12, 1980, Case No. 79-6188. Moore's federal habeas corpus petition is presently pending in the United States District Court for the Middle District of Georgia.

> body did not kill the victim but caused severe and disfiguring injuries to the abdomen, forearm and wrist. She was shot a second time in the face causing portions of the same to be literally blown to pieces. Death ensued from loss of blood. There was testimony that she was lying on the ground "moaning or crying" when the second shot was fired.

Green v. State, 246 Ga. at 607.

Among the issues presented at the state habeas corpus hearing were (1) ineffective assistance of counsel and (2) the request for funds to "investigate." No evidence was submitted during the course of the hearing on the need for expert funds; Petitioner's counsel did make a statement in support of funds.

On the substantive issue regarding the effectiveness of Petitioner's trial counsel, the trial attorney was present and testified at length concerning his representation.

When necessary to address adequately either of the two issues raised in this petition, Respondent will refer to appropriate testimony from the habeas corpus transcript.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

In his state habeas corpus petition, Green alleged ineffective assistance of counsel on multiple grounds, foremost among them a failure to conduct an adequate investigation and a failure to obtain and present mitigating testimony.

Mr. Richard Milam represented Green at the first trial, which resulted in a death penalty; he pursued a direct appeal and succeeded in having this Court vacate the original death sentence, Green v. Georgia, 442 U.S. 95 (1979); at retrial on the sentencing phase, he continued to represent Green. The trial attorney was present at the state habeas corpus hearing and available to testify, although Petitioner elected not to call him to support the allegations of ineffective assistance. The attorney was called by Respondent and testified at length. He commenced representing Green shortly after Green was apprehended in early January of 1977. Although his representation began immediately and he did interview Green, his client made that representation somewhat difficult by escaping from lawful custody. (H.T. 11.)[2/] Concerning his investigation of the facts of the case, the trial attorney testified:

[2/] References to the state habeas corpus transcript will be abbreviated "H.T." followed by the appropriate page number.

I did investigate the case and spent a great deal of time. We were fortunate in one regard, that this case -- there were two indictments. One person was indicted and tried. He did not escape -- Carzell Moore and the State tried his case while Mr. Green was not in custody. So, I had access to the transcript of that trial, and I knew precisely what all the witnesses had testified to in that trial. And I interviewed and went further than the transcript on those that I felt that I needed to talk to. Most of the witnesses were -- not most of the witnesses. A great deal of the witnesses were in South Carolina, and I did not go to South Carolina to interview anyone. But, I did when the witnesses were subpoenaed, I did make arrangements to see these people prior to the trial, the officers from South Carolina, Dorothea Livingston, who was a key witness. I had to go to some length, but Judge Sosebee saw to it that I was able to talk with these people in open court, as a matter of fact, in a very unusual type of hearing prior to the trial of the case beginning. I was allowed to question them under oath. So, I interviewed those witnesses. The most damaging witnesses as far as

> building the case because it was strictly a circumstantial evidence case from the State Crime Lab witnesses, and I, on two separate occasions, went to the State Crime Lab in Atlanta. I interviewed all of the witnesses. There were no witnesses from the Crime Lab that testified in the trial that I had not talked to previously. I went through their files. I was prepared to try the case, yes.

(H.T. 14-15) The trial attorney also testified that witness Charlie Livingston was not cooperative and did not want to answer any of his questions. He expressed surprise by Livingston's testimony because "I'm sure Charlie Livingston couldn't have told me what he was going to say before he got up there and said it. His testimony changed from the first trial to the second trial." (H.T. 15) However, the attorney stated he had the opportunity to cross-examine the witness and was satisfied with his opportunity to cross-examine Livingston.

Regarding the evidence introduced against Green at trial, the trial attorney testified:

> There was nothing that the State introduced into evidence at the trial that I had not, in the way of written reports, that I had not seen prior to the trial. But, in the first trial there was one bit of evidence that I had not seen until 24 hours before the

> trial, a very short period of time. That was the statement of Dorothea Livingston. She had made a statement to law enforcement officers and the F.B.I. agents, and there was a written record of that. I don't have any idea at what point the State obtained that, but they gave it to me prior to the trial -- I take that back. Not 24 hours. I think Friday we had the last hearing and Monday started the trial. So, Friday is when I found out that Dorothea Livingston was going to make a very damaging statement, or had made a very damaging statement. And it was at that point that I tried to devise a way I could talk to her prior to trial, and Judge Sosebee did allow us to have a hearing prior to trial. And then during that hearing I questioned her and two law enforcement officers from South Carolina, and I did have access to the documents and the F.B.I. officers who had taken the statement were present and I did talk to them. But, I didn't call them and neither did the State.

(H.T. 16-17). The attorney also had an opportunity to speak with his client regularly before trial. Asked whether Green was cooperative, the attorney stated:

> Over all, yes. Mr. Green -- of course, when I first saw him -- you have to understand when I first saw him was in early 1977 and he escaped after that. During that first time that I saw him I don't believe that he was fully cooperative with me at that time. But, after he came back, he was very cooperative with me and very demanding of me. Wanted to see me, and did see me a great deal. We talked about the case at least two or three times a week. And, of course, I had a long period of time to prepare for trial.

(H.T. 17) According to the attorney, Green gave him the name of several witnesses to contact, primarily family members. Green told him "how to get in touch with his family, and his family did come. They didn't come the first time, but they did come the second time." (H.T. 18) The attorney was asked whether there were any witnesses whose names he had been given by Green whom he did not contact. He replied:

> I'm sure there were. Although my recollections are not very clear on that. There were several people that I decided just were not necessary for me to talk to I'm sure because we talked continuously. And I was continuously getting the names of -- there was a fellow in Florida and the first story that I

> got involved him, but as it later came out he didn't have anything to do with this case. And I never did interview him prior to trial.

(H.T. 18)

Given the tremendous effort the trial attorney put into representing Roosevelt Green, one can understand why the Petitioner chose not to call the trial attorney to testify in support of his allegations of ineffective assistance of counsel. His investigation and preparation for the trial of this case were exhaustive.

Among the lesser grounds alleged in support of the ineffective assistance of counsel claim is a contention that the trial attorney was ineffective for failing to file a challenge to the array of the traverse jury although, according to the state habeas petition, the list was subject to challenge. Of course, no evidence was presented at the state habeas hearing supporting the claim of an improperly selected jury, nor was any offer of proof made. A possible explanation for the lack of evidence in support may be found in the testimony of the trial attorney who gave reasons for not proceeding with a jury challenge:

> I honestly don't recall whether we filed an array . . . I know that we didn't file a challenge. But, I know that we did not proceed with anything like that because we made the decision based on our opinion that, one, the array was not subject to challenge. Two, this was not a good case to bring

that up in. We did some investigation in that and we had the assistance of the jury committee that Ms. McLaughlin was working with, and we certainly were prepared to do that. We wanted to do anything we could to see to it that he had a full and fair trial, but we reached the determination it just wasn't subject to that. That Monroe County had not long before this trial, Monroe County had in fact gone through and revamped its system and that their jury was not subject to that challenge. So, we didn't proceed with it. We had plenty of things to do and we didn't -- just do things for busy work. We had plenty of real legitimate issues to raise. And we didn't raise that one because we didn't think it was legitimate. That was not just my decision. That was made by all three counsel on looking into the facts. [3/]

(H.T. 21)

[3/] On retrial as to sentence, Mr. Milam associated two other attorneys, Mr. Steve Harrison and Mr. Byrd Garland. Thus, Green was represented by three attorneys on resentencing.

Although Petitioner cites little evidence in his petition to this Court supporting his claim of ineffective assistance of counsel, the primary basis upon which it rests appears to be the allegation that the trial attorney failed to obtain and present mitigating evidence. From a reading of the petition as a whole, one would conclude that no mitigating evidence whatsoever was presented at trial. That would be an inaccurate conclusion.

As this Court is aware from the petition for a writ of certiorari filed in Green v. Georgia, Case No. 80-5986, denied February 23, 1981, testimony was presented in Green's behalf concerning his background and character. First, Green's sister, Lola Green, from New York, testified in her brother's behalf. She and her brother Roosevelt, whom she referred to as "Bubber," were raised together by her grandmother. "She did the best she could in raising us, raised us up until the ages of eleven years old, Bubber was ten and I was eleven years old and after she died, my father started raising us which he had just come back to live in town after about four years before my grandmother died." She testified that their early years were spent in the small town of Minter, Alabama. Their father was a preacher.

> . . . He was a sanctified preacher and he traveled a lot, traveled all over the South, Georgia, Alabama and Florida, and I remember him saying one time my grandmother was getting old and he wanted to be around his kids, you know, if something happened to her so he could take care of them, so him and his wife moved back to Alabama. After my grandmother died, he took care of us.

(T.T. 1005-06)[4/]

[4/] References to the trial transcript are abbreviated "T.T."

Green's sister said she and her brother lived with their father for three years; after his death in 1970 their mother took them, along with their deaf and dumb sister, Rosa Mae, back to New York. Neither of them wanted to go to New York, and three months after arrival Green was taken away and put in a foster home. Lola Green testified further concerning her brother's being placed in a foster home and concluded her testimony with a statement that she loved her brother very much and would ask the jury not to sentence him to death. (T.T. 1008) On cross-examination, the sister also testified that Green was 14 years old when he committed a robbery and burglary in Alabama; she also stated he left home and caught a freight train. (T.T.1010)

Mrs. Annie Green, the mother of the defendant, was present at trial and testified. She testified briefly that Green was her second oldest child and that she loved him. (T.T. 1011-12) The district attorney asked no questions of her.

The trial attorney also made arrangements for a Father James to testify at trial. However, Father James' schedule did not permit him to remain at the trial for the entire six days and he was not allowed to testify out of sequence and disrupt the orderly presentation of the state's case.[5/] However, as the trial attorney testified, although the things to which Father James could have testified "would have been better than the testimony of his mother and his sister" . . . "to some extent it would have been repetitive." (H.T. 21-22) The trial attorney expressed familiarity with Green's background.

[5/] This formed the basis for an enumeration of error on direct appeal and was asserted in the previous petition to this Court as grounds for relief.

> . . . He lived in New York, Alabama, South Carolina, Florida and actually at all points in between he had been up and down the road. That's what he had been doing for many years. He had been -- he had left a correctional institution in Alabama and from that time until the time that he met me, he had been more or less in transit, never staying in one place for a great long length of time, but he had settled in New York and New York City, Long Beach, South Carolina, and some place in Florida for a while.

(H.T. 25) The trial attorney was asked at the state habeas corpus hearing why he didn't force Father James to remain in Monroe County to testify or have him seized as a material witness. The attorney responded:

> Yeah,I'm sure I could have served a subpoena on him. But, the fact is that a witness who is forced to be there when he does not want to be there is not the best kind of witness. And Father James had voluntarily driven there to be of whatever assistance he could be. And we had done what we thought was necessary and proper to preserve his testimony, but it just didn't work. I think that was proper grounds for reversal of the case,

but I know that that's not for me to decide. But, I did not do anything to physically restrain him and declined to do that.

(H.T. 26)

From the foregoing extensive though incomplete summary of the evidence, it is evident that the legal services rendered to Roosevelt Green by his trial attorney were not only adequate but exemplary. The appropriate standard for effective assistance of counsel in Georgia comports with the standard enunciated in this Circuit. It is not errorless counsel, nor counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974). Petitioner received effective assistance of counsel and no ground is herein presented warranting this Court's granting of the petition.

II. PETITIONER IN THIS CIVIL HABEAS CORPUS PROCEEDING WAS NOT ENTITLED TO MONEY, MERELY UPON REQUEST, FOR INVESTIGATION AND PRESENTATION OF EVIDENCE, WHEN GEORGIA LAW PROVIDES INEXPENSIVE ALTERNATIVE MEANS OF PRESENTING EVIDENCE AND THE PETITIONER HAS FAILED TO MAKE ANY SHOWING WHATSOEVER OF WHAT EVIDENCE HE MIGHT DISCOVER WHICH WOULD ASSIST IN ESTABLISHING FEDERAL CONSTITUTIONAL INFIRMITIES IN HIS CONVICTION AND SENTENCE.

At the outset of the state habeas corpus hearing, Petitioner renewed his motion for additional funds and attempted to offer justification for the funds. The reasons given were:

> . . . Some of the allegations that are raised in our petition are that there was additional mitigating evidence present that could have been presented to the jury in the second trial. In order to find all of this evidence, we feel that we need funds for an investigator to search out this evidence. And we'd also move the Court for funds to obtain services of a psychiatrist so that we might be able to give him the opportunity to talk to Roosevelt and to examine Roosevelt to see if in fact

> there was additional mitigating evidence that could have been presented at the trial.

(H.T. 3) Noticeably lacking were specific examples of mitigating evidence which Petitioner hoped to uncover. Neither did Petitioner testify regarding such mitigating evidence. The net effect of the request was for Petitioner to assert that he had made certain allegations, with no foundation, and now he would like funds to see if the allegations he made might somehow be supported.

In its order of September 18, 1981, the state habeas corpus court ruled that "[t]here is no evidence that additional funds could have produced any valuable or helpful evidence and the State is not required to furnish money for research or fishing expeditions." State habeas order at 4.

In his petition to this Court, Petitioner says:

> . . . Mr. Milam testified during the habeas hearing that, although he knew that Petitioner had grown up in the states of Alabama and New York, that due to a lack of funds, no effort was made to investigate in the states in which Petitioner was raised for evidence in mitigation or witnesses who could testify as to Petitioner's character or background.

Petition at 4. In reality, the attorney's testimony was quite different. The following colloquy occurred at the hearing:

Q Okay. Did you ever go to New York to attempt to find anybody who had known him there outside of his family?

A I've never been to New York in my life.

Q Okay. Can you tell me why you didn't go up there?

A The first reason is I didn't think it was necessary to really go. Whether I thought it was necessary or not, I didn't have the funds to do that. I had a very difficult time getting paid for what I did and there certainly was no money for me to go to New York.

(H.T. 23-24) (Emphasis supplied.) As has been set forth fully in previous portions of this brief, the trial attorney did obtain testimony from family witnesses who came from New York concerning Green's childhood, background, character, and family situation. Further, he made an effort to obtain the testimony of Father James from Alabama but, for reasons explained elsewhere, was unable to do so. And as the trial attorney further testified, although he would have liked to have Father James' testimony, to some extent it would have been "repetitive." (H.T. 22)

As for additional witnesses in Alabama, the attorney said Roosevelt Green "never told me anybody to see over there that I can recall." (H.T. 25) Because of the nomadic life that Green had led, it appears the only person with him for any extended period of time was the sister who testified in mitigation at trial.

Regarding the alleged need for psychiatric examination at the 1981 state habeas hearing, Green was examined by a psychiatrist pursuant to court order before his original trial in 1978. The results of that psychiatric examination were that Green was suffering from no psychoses, that he was in "good reality contact," and that he understood the nature of the charges against him. (Original trial record at 44-45)

Petitioner received a fair, impartial trial. He received a full and fair state habeas corpus hearing. The voluminous transcript and record were submitted at no expense to Petitioner. His trial attorney was present and testified at no expense to Petitioner, although Petitioner chose not to call the attorney as his witness. Petitioner was present at the hearing, but chose not to testify in his own behalf.

In the somewhat different context of providing counsel to indigent defendants on discretionary appeals, this Court said in Ross v. Moffitt, 417 U.S. 600, 616 (1974) that "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant . . ., but only to assure the indigent defendant an adequate opportunity to present his claims fairly. . . ." In the present case, Petitioner made no specific showing whatever of any additional evidence he would like to present. At trial he was represented by three attorneys at no cost to him. He has been represented by counsel at every step of the way both in the criminal proceedings and in the habeas corpus proceedings. And although he was not constitutionally or statutorially entitled to it, Petitioner was awarded an additional $500.00 at his resentencing trial to pay for a "jury committee" to assist in the selection of jurors. (H.T. 24)

In short, Petitioner has not established a federal constitutional right to the funds he sought, nor has he established a state statutory or constitutional right, nor has he even shown need. The second asserted ground provides no basis for granting the petition.

CONCLUSION

This Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by Petitioner Green.

Respectfully submitted,

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